

C
O
P
Y
MEMORANDUM

12 October 1945

OGC Has Reviewed

TO: Director

FROM: Office of General Counsel

SUBJECT: Certification of Vouchers for the Expenditure of Confidential Funds

1. On 20 September 1945 the President issued Executive Order No. 9621, effective 1 October 1945, in which he terminated the Office of Strategic Services and disposed of its functions.

2. This order reads in part as follows:

"By virtue of the authority vested in me by the Constitution and Statutes, including Title I of the First War Powers Act, 1941, and as President of the United States and Commander in Chief of the Army and Navy, it is hereby ordered as follows;

"1. * * *

"2. * * *

"3. All functions of the Office not transferred by paragraph 1 of this order, together with all personnel, records, property, and funds of the Office not so transferred, are transferred to the Department of War; and the Office, including the office of the Director of Strategic Services, is terminated. The functions of the Director of Strategic Services and of the United States Joint Chiefs of Staff, relating to the functions transferred by this paragraph, are transferred to the Secretary of War. * * *"

3. Public Law 156 of the 79th Congress (National War Agencies Appropriation Act, 1946) in appropriating \$20,000,000 for the Office of Strategic Services for the fiscal year, 1946, specifies:

"Provided, That \$10,500,000 of this appropriation may be expended without regard to the provisions of law and regulations relating to the expenditure of Govern-

2-

ment funds or the employment of persons in the Government service, and \$10,000,000 of such \$10,500,000 may be expended for objects of a confidential nature, such expenditures to be accounted for solely on the certificate of the Director of the Office of Strategic Services and every such certificate shall be deemed a sufficient voucher for the amount therein certified."

Query: May the President by Executive Order transfer to the Secretary of War or the person delegated by the Secretary of War the authority granted by the National War Agencies Appropriation Act, 1946 to the Director of the Office of Strategic Services to account for objects of a confidential nature solely on the certificate of the Director; and would such certificate be deemed a sufficient voucher for the amount therein certified?

4. It is to be noted that the President disposed of the functions of OSS by virtue of the power vested in him by the First War Powers Act. The pertinent sections of that act read as follows:

FIRST WAR POWERS ACT, 1941
ACT DECEMBER 18, 1941, C. 593, 55 STAT. 838

"§ 601. Coordination of executive bureaus, offices, etc., by President for national defense and to prosecute the war; issuance of regulations

"For the national security and defense, for the successful prosecution of the war, for the support and maintenance of the Army and Navy, for the better utilization of resources and industries, and for the more effective exercise and more efficient administration by the President of his powers as Commander in Chief of the Army and Navy, the President is hereby authorized to make such redistribution of functions among executive agencies as he may deem necessary, including any functions, duties, and powers hitherto by law conferred upon any executive department, commission, bureau, agency, governmental corporation, office, or officer, in such manner as in his judgment shall seem best fitted to carry out the purposes of this title (sections 601-605 of this Appendix), and to this end is authorized to make such regulations and to issue such orders as he may deem necessary, which regulations and orders shall be in writing and shall be published in accordance with the Federal Register Act of 1935 (sections 301-310, 311-314 of Title 44): Provided, That the termination of this title (sections 601-605 of this Appendix), shall not affect any act done or any right or obligation accruing or accrued pursuant to this title (sections 601-605 of this Appendix) and during the time that this title (sections 601-605 of this Appendix),

is in force: Provided further, That the authority by this title (sections 601-605 of this Appendix), granted shall be exercised only in matters relating to the conduct of the present war: Provided further, That no redistribution of functions shall provide for the transfer, consolidation, or abolition of the whole or any part of the General Accounting Office or of all or any part of its functions." (50 App. USCA 601)

"S 602. Same, consolidation of offices; transfer of duties, personnel, ~~and~~ records

"In carrying out the purposes of this title (sections 601-605 of this appendix) the President is authorized to utilize, coordinate, or consolidate any executive or administrative commissions, bureaus, agencies, governmental corporations, offices, or officers now existing by law, to transfer any duties or powers from one existing department, commission, bureau, agency, governmental corporation, office, or officer to another, to transfer the personnel thereof or any part of it either by detail or assignment, together with the whole or any part of the records and public property belonging thereto." (50 App. USCA 602)

"S 603. Expenditure of appropriations for bureaus, offices, etc.

"For the purpose of carrying out the provisions of this title (sections 601-605 of this Appendix,) any moneys heretofore and hereafter appropriated for the use of any executive department, commission, bureau, agency, governmental corporation, office, or officer shall be expended only for the purposes for which it was appropriated under the direction of such other agency as may be directed by the President hereunder to perform and execute said functions, except to the extent hereafter authorized by the Congress in appropriation Acts or otherwise." (50 App. USCA 603)

"S 604. Presidential recommendation to Congress for elimination of certain bureaus, offices, etc.

"Should the President, in redistributing the functions among the executive agencies as provided in this title (sections 601-605 of this Appendix), conclude that any bureau should be abolished and its duties and functions conferred upon some other department or bureau or eliminated entirely, he shall report his conclusions to Congress with such recommendations as he may deem proper." (50 App. USCA 604)

"§ 605. Suspension of conflicting laws; restoration of duties and powers to bureaus, offices, etc., upon termination of sections

"All laws or parts of laws conflicting with the provisions of this title (sections 601-605 of this Appendix) are to the extent of such conflict suspended while this title (sections 601-605 of this Appendix) is in force.

"Upon the termination of this title (sections 601-605 of this Appendix) all executive or administrative agencies, governmental corporations, departments, commissions, bureaus, offices, or officers shall exercise the same functions, duties, and powers as heretofore or as hereafter by law may be provided, any authorization of the President under this title (sections 601-605 of this Appendix) to the contrary notwithstanding." (50 App. USCA 605)

b. We must face therefore the historical position of OSS in relation to this statute in the following manner;

(a) The office of the Coordinator of Information was established by Executive Order of 11 July 1941. Then the President by order dated 13 June 1942 declared that the office of the Coordinator of Information exclusive of the portion transferred to OWI should thereafter be known as the Office of Strategic Services. Therefore, the First War Powers Act is applicable to OSS as an agency whose predecessor was in existence on 18 December 1941.

(b) By the provisions of the First War Powers Act as above quoted, the President does have the authority to transfer a portion of OSS to the War Department and to transfer to the Secretary of War the functions of the Director of the Office of Strategic Services.

(c) The Secretary of War may exercise the powers granted to the Director of OSS in the National War Agencies Appropriation Act, 1946, provided that the funds are expended only for the purposes for which they were appropriated in said act.

6. The exercise of the power to certify vouchers for the expenditure of confidential funds calls for the highest discretion and judgment. It is certainly not a merely administrative function. It is a well recognized principle of the law applying to officers of the Government that where a discretionary power is granted to the head of a department it must be exercised by the head of the department or an assistant or

other official authorized to act in place of the head of the department. Such a power cannot be delegated to a subordinate official (20 C.G. 27, 20 C.G. 779, 22 C.G. 1079). In the case of the power thus transferred by Executive Order to the Secretary of War, the power can be exercised only by the Secretary of War or Assistant Secretary or Under Secretary. Since OSS is no longer an independent agency, the person who occupies the office of the head of the Strategic Services Unit must be considered for the purposes of this principle of law to be a subordinate official.

7. It is the opinion of this office that Executive Order No. 9621 legally transfers to the Secretary of War the authority granted by the National War Agencies Appropriation Act to the Director of the Office of Strategic Services to account for objects of a confidential nature solely on the certificate of the Director and that such a certificate would be a sufficient voucher for the amount therein certified. And it is our further opinion that this power to certify may be exercised only by the Secretary of War, an Assistant or Under Secretary of War and may not be exercised by the commanding officer of the Strategic Services Unit even if the Secretary of War were to attempt to specifically delegate such power.

STATINTL

1st Lieutenant, JAGC